APPENDIX A

Constitutional Provisions, Statutes and Regulations Cited

(Copy Connecticut General Statutes Section 8-129 and Section 8-137 as attached hereto)

(Copy Fourteenth Amendment of the Constitution of the United States as cited)

"Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws . . . "

§ 8-129. Agency to determine compensation and file with superior court and town clerks; notice to owners and interested parties. Possession of land. Certificate of taking

The redevelopment agency shall determine the compensation to be paid to the persons entitled thereto for such real property and shall file a statement of compensation, containing a description of the property to be taken and the names of all persons having a record interest therein and setting forth the amount of such compensation, and a deposit and bond, as provided in section 8-130, with the clerk of the superior court for the county in which the property affected is located. Upon filing such statement of compensation, deposit and bond, the redevelopment agency shall forthwith cause to be recorded, in the office of the

town clerk of each town in which the property is located, a copy of such statement of compensation, such recording to have the same effect as and to be treated the same as the recording of a lis pendens, and shall forthwith give notice, as hereinafter provided, to each person appearing of record as an owner of property affected thereby and to each person appearing of record as a holder of any mortgage, lien, assessment or other encumbrance on such property or interest therein (a), in the case of any such person found to be residing within this state, by causing a copy of such notice, with a copy of such statement of compensation, to be served upon each such person by a sheriff, his deputy or a constable or an indifferent person, in the manner set forth in section 52-57 for the service of civil process and (b), in the case of any such person who is a nonresident of this state at the time of the filing of such statement of compensation, deposit and bond or of any such person whose whereabouts or existence is unknown, by mailing to each such person a copy of such notice and of such statement of compensation, by registered or certified mail, directed to his last-known address, and by publishing such notice and such statement of compensation at least twice in a newspaper published in the county and having daily or weekly circulation in the town in which such property is located. Any such published notice shall state that it is notice to the widow or widower, heirs, representatives and creditors of the person holding such record interest, if such person is dead. If, after a reasonably diligent search, no last-known address can be found for any interested party, an affidavit stating such fact, and reciting the steps taken to locate such address, shall be filed with the clerk of the superior court and accepted in lieu of mailing to the last-known address.

Not less than twelve days nor more than ninety days after such notice and such statement of compensation have been so served or so mailed and first published, the redevelopment agency shall file with the clerk of the superior court a return of notice setting forth the notice given and, upon receipt of such return of notice, such clerk shall, without any delay or continuance of any kind, issue a certificate of taking setting forth the fact of such taking, a description of all the property so taken and the names of the owners and of all other persons having a record interest therein. The redevelopment agency shall cause such certificate of taking to be recorded in the office of the town clerk of each town in which such property is located. Upon the recording of such certificate, title to such property in fee simple shall vest in the municipality, and the right to just compensation shall vest in the persons entitled thereto. At any time after such certificate of taking has been so recorded, the redevelopment agency may repair, operate or insure such property and enter upon such property, and take whatever action is proposed with regard to such property by the project area redevelopment plan. The notice referred to above shall state (a) that not less than twelve days nor more than ninety days after service or mailing and first publication thereof, the redevelopment agency shall file, with the clerk of the superior court of the county in which such property is located, a return setting forth the notice given, (b) that upon receipt of such return such clerk shall issue a certificate for recording in the office of the town clerk of each town in which such property is located, (c) that upon the recording of such certificate, title to such property shall vest in the municipality, the right to just compensation shall vest in the persons entitled thereto and the redevelopment agency may repair, operate or insure

such property and enter upon such property and take whatever action may be proposed with regard thereto by the project area redevelopment plan and (d) that such notice shall bind the widow or widower, heirs, representatives and creditors of each person named therein who then or thereafter may be dead. When any redevelopment agency acting in behalf of any municipality has acquired or rented real property by purchase, lease, exchange or gift in accordance with the provisions of this section, or in exercising its right of eminent domain has filed a statement of compensation, deposit and bond with the clerk of the superior court and has caused a certificate of taking to be recorded in the office of the town clerk of each town in which such property is located as herein provided, any judge of such court may, upon application and proof of such acquisition or rental or such filing, deposit and bond and such recording, order such clerk to issue an execution commanding the sheriff of the county or his deputy to put such municipality and the redevelopment agency, as its agent, into peaceable possession of the property so acquired, rented or condemned. The provisions of this section shall not be limited in any way by the provisions of chapter 922. (1961, P.A. 231, § 1.)

§ 8-137. Transfer, sale or lease of real property in a redevelopment area

The redevelopment agency, for the purpose of this chapter, may sell or lease for such sums as are agreed upon the whole or any part of a redevelopment area to the redeveloper *or,* if the property is to be used for public purposes, to an appropriate public agency. The consideration paid for the sale or lease of the property shall be determined by the redevelopment agency, provided, if the cost or carry-

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ing charges of such land to the redevelopment agency are greater than such consideration, the redevelopment agency shall first have specific authorization from the legislative body of the municipality for the sale or lease at any lesser consideration, and the municipality may appropriate and authorize the expenditure of money to compensate for any portion of the difference between the acquisition cost of such property and such sale or lease price of such property at a lesser consideration to a redeveloper, but in no case shall such sale or lease price be lower than the use value of such property. Each contract for sale or lease to a redeveloper shall provide, among other things, (a) that the property transferred shall be developed and used in accordance with the redevelopment plan or such plan as modified with the approval of the redevelopment agency; (b) that the building of the improvements shall begin within a period of time which the redevelopment agency fixes as reasonable; and (c) that all transfers of property by the redeveloper shall be subject to the consent of the redevelopment agency; except that the requirements of subdivisions (b) and (c) above may be waived by the redevelopment agency with respect to any bona fide mortgage placed upon the property by the redeveloper in order to obtain financing for the project. Any such mortgage, with the approval of the agency, shall be free of the requirements of said subdivisions (b) and (c). Any contract for sale or lease shall be approved by the legislative body before its final approval by the redevelopment agency. Any contract for sale or lease to a redeveloper may provide, among other things, (a) that the properties in the redevelopment area shall be maintained in accordance with the redevelopment plan; (b) that the redevelopment agency shall have the right of inspection; (c) that the redeveloper, as security for its ful-

fillment of the contract, shall make a cash deposit or give a bond with such surety as the contract may provide or make such other guarantee as the redevelopment agency deems necessary in the public interest; and that, if the redevelopment agency finds that the redevelopment is not being maintained in accordance with the contract terms and conditions, it shall notify the redeveloper or its successor in title in writing of the work which shall be done to meet the standards of maintenance agreed upon. Unless the redeveloper or its successor in title complies within ninety days with the requirements of the redevelopment agency as stated in such notice, the redevelopment agency may cause such work to be done, and the cost of the work shall be paid by the redevelopment agency out of the deposit herein provided for; and that, if a redevelopment agency, pursuant to this subsection, causes any work to be paid for out of such deposit, the redeveloper shall, within thirty days thereafter, pay an equivalent amount to the redevelopment agency in order to replenish the deposit; and that, if the redeveloper fails to make such payment within thirty days after being notified by the redevelopment agency to do so, it shall be liable to such agency in the penal sum of twice the amount of the cost of the work, which sum may be recovered in a civil action; (d) that any municipality may contract to retain or accept, close, relocate, construct, reconstruct and maintain specified streets, playgrounds, parks or other public facilities within the area of the proposed redevelopment. Upon consummation of the contract for sale or lease of a site to a redeveloper, any municipality may provide for the extension of such streets, sidewalks and public utilities as are necessary to its use for residential purposes. (1949 Rev., § 984; 1957, P.A. 13, § 55; 1957, P.A. 648.)

APPENDIX B

(Judgment and Proceedings Below)

Opinion of the Connecticut Supreme Court

STATE OF CONNECTICUT
SUPREME COURT

OCTOBER TERM, 1969

(Argued Decided December 3, 1969)

BROADRIVER, INC. *v.* CITY OF STAMFORD ET AL.

Action for an injunction restraining the defendants from proceeding with the condemnation of the plaintiff's land, for a judgment that the defendants have no right, title or interest in the plaintiff's land, for damages, and for other relief, brought to the Superior Court in Fairfield County at Stamford and tried to the court, *Sidor, J.;* judgment for the defendants and appeal by the plaintiff. *No error.*

Julius B. Kuriansky, for the appellant (plaintiff).

Robert M. Wechsler, with whom were *Cary L. Fleisher* and, on the brief, *Bernard Glazer,* for the appellees (defendants).

ALCORN, J. The plaintiff owns slightly less than a quarter of an acre of land which is on the periphery of a 130-acre redevelopment area in the center of Stamford. Situated on the plaintiff's land is an old frame barn and an unsightly former residence over seventy-five years old which has been converted to commercial uses. The buildings are substandard, and the most effective, highest and best use is not now being made of the property.

The plaintiff brought this action against the city of Stamford, the members of the Stamford redevelopment commission, hereinafter called the commission, and the clerk of the Superior Court at Stamford, seeking temporary and permanent injunctions and damages. The injunctions prayed for are to restrain the city and its redevelopment commission from condemning the plaintiff's property; to restrain them from filing further "condemnation papers" and to order them to release and withdraw those already filed; and to restrain the clerk of the Superior Court from issuing a certificate of taking. Judgment that the city and the "members" of the redevelopment commission have no interest in the plaintiff's property is sought.

The complaint, as amended, contains five counts. The first count, in substance, alleges that the city and its redevelopment commission acted capriciously and arbitrarily in taking the plaintiff's property for a private rather than a public use in order to attract sponsors for the redevelopment. The second count alleges that the city and its redevelopment commission had unnecesarily planned to take a segment of the plaintiff's land for street widening and that they incorrectly claimed that the remainder of the plaintiff's land would be narrow and economically unusable, a determination which should be left to the plaintiff. The third count alleges that the city and its redevelopment commission have deprived the plaintiff of due process by purporting to take the segment of land for street widening under the statutes relating to redevelopment rather than those relating to eminent domain. The fourth count alleges that the city and its redevelopment commission have caused loss to the plaintiff by disparaging the value of its land. The fifth count alleges that the defendants failed to meet

the requirements of General Statutes § 8-129 in order to accomplish a valid and constitutional taking of the plaintiff's property.

The original complaint, containing the first four counts was filed on August 23, 1966. Following a hearing in September, 1966, temporary injunctions were denied by the court. The fifth count was added to the complaint in April, 1967, and thereafter trial was had on the issue of a permanent injunction. The record and briefs disclose that the claim for damages was abandoned. The court found for the defendants on the remaining issues, and the plaintiff has appealed.

We turn our attention first to the plaintiff's attack on the procedure for the taking under General Statutes § 8-129. The pertinent part of the statute provides that the redevelopment agency shall file with the clerk of the Superior Court a statement setting forth a description of the property to be taken, the names of all persons having a record interest in it and the amount of compensation determined to be paid for it, with a deposit and bond; that it shall then cause a copy of the statement to be recorded with the town clerk of the town in which the land is located and give notice to each person appearing of record as an owner of, or an encumbrancer on, the property, the method of giving such notice being specified; and that "[n]ot less than twelve days nor more than ninety days after such notice and such statement of compensation have been so served or so mailed and first published" the redevelopment agency shall file with the clerk of the Superior Court a return setting forth the notice given, whereupon the clerk shall issue a certificate of taking which, upon its being recorded with the town clerk in the town where the land is situated, shall vest title

to the property in the municipality in fee simple and the right to just compensation shall vest in the persons entitled thereto.

The plaintiff claims, first, that the certificate of taking was not issued by the clerk of the Superior Court nor recorded in the town clerk's office in Stamford within the time required by the statute and, second, that the statute operates unconstitutionally in this case because the city was permitted to obtain title to the plaintiff's property by the issuance of a certificate of taking before the determination of the present action, which was brought to test the legality of the taking. In other words, the plaintiff makes the double-barreled claim that the certificate of taking was filed too late and too soon.

The finding of the court, which is not subject to correction, is that the commission filed a notice of taking and statement of compensation on July 14, 1966. On August 23, 1966, the complaint in the present action was filed. On December 20, 1966, the trial court, after hearing, denied the plaintiff's application for temporary injunctions, and on February 1, 1967, the clerk of the Superior Court issued a certificate of taking which was, on that day, recorded in the office of the town clerk in Stamford.

The plaintiff concedes that, as this court has held in *Bahr Corporation* v. *O'Brion,* 146 Conn. 237, 246, 149 A.2d 691, the statute (§ 8-129) is not unconstitutional because of any failure to provide for a judicial review of the validity of the taking. As we pointed out in that case (p. 247), the constitutional right to due process is protected by the plaintiff's privilege to seek relief by court action. The plaintiff availed itself of that privilege by bringing this action thirty-five days after the notice of taking and

statement of compensation was filed. The temporary relief requested was identical to the plaintiff's ultimate objective, namely, to restrain the city and the commission from taking the plaintiff's property and from filing any further "condemnation papers" and to restrain the clerk of the Superior Court from issuing a certificate of taking.

With that action pending the defendants properly refrained from taking any further steps under § 8-129 until the court had acted on the claim for temporary relief. In the event that the court should decide to grant the requested relief, the defendants, in all probability, would be enjoined, until the case should be finally determined, from doing those things which the statute required them to do. *Deming* v. *Bradstreet,* 85 Conn. 650, 659, 84 A. 116.

The plaintiff's application for a temporary injunction was fully heard by the court and was denied on December 20, 1966. The maximum period of ninety days within which § 8-129 required the filing of the return upon the basis of which the clerk was directed to issue the certificate of taking had then long since expired. The action of the court had, however, freed the defendants of the threat of restraint from proceeding as the statute required, pending the court's final decision on the ultimate issue. They were justified in interpreting the decision as a conclusion, by the court, that no such restraint was required in order to protect the rights of the parties during the pendency of the action. *Deming* v. *Bradstreet,* supra.

The denial of the temporary injunction nevertheless left the plaintiff free to obtain a full and final determination of the issues it had raised and, if successful, to obtain the relief sought regardless of what, if any, action the defendants might see fit to take in the interim. *Industrial Bank*

of Washington v. *Tobriner*, 405 F.2d 1321, 1323 (D.C. Cir.); *Ramsburg* v. *American Investment Co. of Illinois*, 231 F.2d 333, 336 (7th Cir.); *Turney* v. *Shriver*, 269 Ill. 164, 172, 109 N.E. 708; 42 Am. Jur. 2d, Injunctions, § 318. At the same time, the defendants would, as the cases cited indicate, act at their peril if they undertook to do any act which the plaintiff sought to enjoin. The court's power to restore the status quo or to grant such other relief as might be proper remained unaffected by the disposition made of the temporary injunction. See *Jones* v. *Securities & Exchange Commission*, 298 U.S. 1, 17, 18, 56 S. Ct. 654, 80 L. Ed. 1015; *Texas & N.O.R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475, 479, 48 S. Ct. 361, 72 L. Ed. 661; 42 Am. Jur. 2d, Injunctions, § 16. Consequently, the plaintiff's rights were fully protected, the issuance of a certificate of taking notwithstanding.

Under those circumstances, the defendants continued with the procedures required by General Statutes § 8-129 and, without unreasonable delay, on February 1, 1967, the certificate of taking was issued by the clerk. We have said that strict compliance with the steps enumerated by statute is essential to the validity of proceedings for the adoption of a redevelopment plan. *Sheehan* v. *Altschuler*, 148 Conn. 517, 523, 172 A.2d 897. We were discussing, in that case, the requirement laid down by § 8-127 for a public hearing before a redevelopment plan could be adopted, or, in other words, action which was basic to the objective to be accomplished.

The most satisfactory test of whether a statute is mandatory or merely directory "is whether the prescribed mode of action is of the essence of the thing to be accomplished, or in other words whether it relates to a matter of sub-

stance or to matter of convenience." *International Brotherhood of Teamsters* v. *Shapiro,* 138 Conn. 57, 68, 82 A.2d 345; *Gallup* v. *Smith,* 59 Conn. 354, 358, 22 A. 334. Where the thing required to be done is one of substance the statutory provision is mandatory. *State ex rel. Eastern Color Printing Co.* v. *Jenks,* 150 Conn. 444, 451, 190 A.2d 591; *Blake* v. *Meyer,* 145 Conn. 612, 616, 145 A.2d 584. However, "[l]egislative provisions designed to secure order, system and dispatch in proceedings are ordinarily held to be directory where, as here, they are stated in affirmative terms or, to express it differently, are unaccompanied by negative words." *Winslow* v. *Zoning Board,* 143 Conn. 381, 388, 122 A.2d 789. Such a statutory provision is one which prescribes what shall be done but does not invalidate action upon a failure to comply. *Nielsen* v. *Board of Appeals on Zoning,* 129 Conn. 285, 287, 27 A.2d 392; see *Wilson Point Property Owners Assn.* v. *Connecticut Light & Power Co.,* 145 Conn. 243, 266, 140 A.2d 874.

The obvious purpose of the ninety-days requirement in § 8-129 is to guard against the harm which could result to a property owner from an unreasonable delay between the notice of taking and the actual taking. The statute contains nothing to invalidate a belated title transfer or which inferentially makes compliance with the time requirement a condition precedent. *International Brotherhood of Teamsters* v. *Shapiro,* supra. Section 8-129 provides that, upon issuance of the certificate of taking by the clerk, title shall vest in the municipality, and the right to compensation shall vest in the property owner. The time fixed by the statute within which the return of notice shall be filed is "designed to secure order, system and dispatch", *Winslow* v. *Zoning Board,* supra, in defining when title shall pass and

when the property owner's right to compensation shall mature. Under the circumstances disclosed, strict compliance with the time requirement was not required in order to accomplish a valid taking of the plaintiff's property.

The plaintiff would have us hold that, by deferring action under § 8-129 pending the decision of the court on the temporary injunction until too late for strict compliance with the mandate of the statute, the municipality has lost any right to acquire the property. Such a construction of the statute would permit any objecting condemnee to defeat a taking under § 8-129 by the simple expedient of an application for injunctive relief sufficiently prolonged unless the condemnor, at its peril, chose to act in the face of the threat of a restraining order. Under the plaintiff's theory, once the time limit fixed in the statute had passed, and even though the case had not been reached for hearing even on an application for a temporary injunction, the condemnee would have attained his ultimate objective without the necessity of a final hearing on the main issue because the condemnor's right to acquire the property already would have been defeated. Where, as in this case, the property owner has initiated action designed to defeat the taking, that action should not be allowed to accomplish an anomalous result. The plaintiff gains nothing by its attack on the procedure under § 8-129.

The numerous other claims of the plaintiff all concentrate basically on the proposition that, for various reasons, the action of the redevelopment commission in taking the plaintiff's property as part of the redevelopment plan was unreasonable, taken in bad faith and amounted to an abuse of the power conferred upon it. In support of these claims it is argued that the plaintiff's property was, in reality,

taken for a private purpose through the unjustified reliance, by the commission, on an unenforceable and sham contract utilized to permit preselected redevelopers to control decisions which the commission should have made; and that the commission illegally designated certain properties, including the plaintiff's, within the redevelopment area for condemnation while permitting others to be developed to conservation standards by the existing owners.

The commission is invested with broad powers to carry out urban renewal projects including the acquisition of property and reconstruction of streets; General Statutes § 8-141; and plans for carrying out the demolition or the voluntary rehabilitation of buildings. § 8-143; *Graham* v. *Houlihan*, 147 Conn. 321, 328, 160 A.2d 745, cert. denied, 364 U.S. 833, 81 S. Ct. 70, 5 L. Ed. 2d 57. In addition to the facts already recited, the court has found that, following a study of the area to be included in the downtown redevelopment area, the commission adopted a plan for the redevelopment of the central core of the city of Stamford in order to eliminate blight and deterioration in the downtown area and provide an environment conducive to the full economic and social potential of the area. The plan as originally conceived did not include the plaintiff's land. The plaintiff's property, however, is on the corner of Broad and River Streets, a strategic corner of the redevelopment area and one of the most heavily traveled areas in the city. The corner has been one of the most dangerous in Stamford. In February, 1963, an extended development plan, which included the plaintiff's property, was adopted by the commission, as permitted by General Statutes § 8-136, and was approved by the Stamford board of representatives, the federal government, and the Stamford planning board.

Directly across Broad Street from the plaintiff's property is the Bloomingdale Department Store complex, which although not geographically in the redevelopment area is nevertheless a factor of major importance to the redevelopment. The redevelopment plan contemplated a main traffic loop, of which Broad and River Streets would form a part, around the redevelopment area. Construction of this loop required a widening and improvement of Broad and River Streets. The commission determined that 3600 square feet of the plaintiff's property was necessary to be taken for the widening and realignment of this intersection. The remainder of the plaintiff's property is an inadequate unit of development by itself because of its size and location, and the commission planned to combine it, for disposition, with another parcel. The commission's plan was to acquire certain of the properties within the redevelopment area, including the plaintiff's, and to allow others to remain in private ownership subject to being brought to conservation standards. The plaintiff's property is vital to the plan because it serves as a connection between the Bloomingdale complex and the redevelopment area.

The plaintiff makes no claim that the commission had not determined, legally and in good faith, the total area of redevelopment. Nor does it contend that its own property was not a fit subject for development. On the contrary, the court has found that, for over twenty years, the plaintiff had recognized the need for improving its property but had done nothing about it. The basic assertion is that the plaintiff should be permitted to improve its property to acceptable standards itself, as some other owners in the redevelopment area are permitted to do, rather than to have it taken by the commission and transferred to others for re-

development. No facts appear which would indicate that the commission had acted unreasonably or in a discriminatory manner in deciding to acquire the plaintiff's property. Looming large in the plaintiff's contention, however, is the claim that the commission has purported to contract with redevelopers for the property but that the purported contract is nothing more than an illusory and void instrument designed to favor the private interests of the redevelopers.

It is well settled that the determination of what property is necessary to be taken in order to effectuate the public purpose of the redevelopment rested with the commission subject to proper review by the court. *Gohld Realty Co.* v. *Hartford,* 141 Conn. 135, 147, 104 A.2d 365. And where the public use which justifies the taking of the area in the first instance exists, an element over which there is no controversy in the present case, that same public purpose continues even though the property is later transferred to private persons. Id., 143. Although the plaintiff's concern is for its own parcel within the redevelopment area, the commission's responsibility was to consider conditions existing in the entire area including such matters as street layouts and the relation and significance of the plaintiff's property to the entire area. *Pet Car Products, Inc.* v. *Barnett,* 150 Conn. 42, 52, 184 A.2d 797.

It is unnecessary to elaborate upon the details of the contract between the commission and the redeveloper which the plaintiff claims is illusory and void. It is sufficient to say that a lengthy instrument had been executed between the commission and Seon Pierre Bonan and the F. D. Rich Company, Inc., as redevelopers, which the commission asserts to be a valid and binding contract looking to the performance, by the redevelopers, of various preliminary obligations and the ultimate purchase, for redevelopment, of properties ac-

quired by the commission. The plaintiff attempts to show that it was denied the right to improve its property, instead of having it taken, only because the commission conditioned the plaintiff's exercise of that right solely on the consent of the redeveloper to which the commission considered itself bound by the allegedly void contract.

The short answer to that contention is that, regardless of whether the contract was or was not binding, the plaintiff has failed to show that the commission has acted as the plaintiff claims. Any action by the commission required a majority vote of its members. General Statutes § 8-126. From the evidence before it, the court has found that the president of the plaintiff corporation met with the chairman of the commission, the plaintiff's attorney and two men whose connection with the controversy does not appear. The meeting was requested by the plaintiff's attorney and, at it, the plaintiff's president "maintained that he was prepared to develop" the portion of the property not needed for the street improvement either as one piece or in combination with other property in the redevelopment area. He was told by someone at the meeting, but the identity of his informant does not appear, that "the land in the project for private development" was to be offered first to the redeveloper under "an agreement." Either the chairman of the commission or one of the unidentified men at the meeting suggested that the plaintiff's president attempt to agree with the redeveloper that, either alone or in conjunction with the redeveloper, the plaintiff might develop its property and that if such agreement was reached it would be recommended to the commission. No one at the meeting had any authority to bind the commission, and the plaintiff's president was unable to agree with the redeveloper.

There is nothing in the foregoing which can be tortured into a finding that the commission itself did anything in this episode, either in reliance on any contract or otherwise. The most which can be gleaned from it is that the plaintiff was extended a courtesy which its situation did not demand. The court concluded that, in taking the plaintiff's property, and in all other aspects of the redevelopment procedures attacked by the plaintiff, the commission did not act unreasonably, in bad faith or by abusing the powers conferred on it. The subordinate facts found, which are not subject to correction, support those conclusions.

There is no error.

In this opinion the other judges concurred.